



National Association  
of Independent  
Colleges and Universities

1025 Connecticut Ave. N.W.  
Suite 700  
Washington, DC 20036-5405

Tel: (202)785-8866  
Fax: (202)835-0003  
www.naicu.edu

July 10, 2017

Wendy Macias  
U.S. Department of Education  
400 Maryland Avenue, SW  
Room 6C111  
Washington, DC 20202

Re: Docket ID ED-2017-OPE-0076

Dear Ms. Macias:

In response to the notice published in the *Federal Register* on June 16, 2017, regarding the formation of negotiated rulemaking panels to consider revisions to the Department of Education's gainful employment and borrower defense to repayment regulations, I write to offer comments on behalf of the National Association of Independent Colleges and Universities (NAICU).

NAICU serves as the unified national voice of independent higher education and reflects the diversity of private, nonprofit higher education in the United States. Our member institutions include major research universities, church-related colleges, historically black colleges, art and design colleges, traditional liberal arts and science institutions, women's colleges, two-year colleges, and schools of law, medicine, engineering, business, and other professions. With over three million students attending independent colleges and universities, the private sector of American higher education has a dramatic impact on our nation's larger public interests.

NAICU supports the need for regulations which consistently and fairly implement the borrower defense to repayment statutory directive, as instructed by Congress in Section 455(h) of the Higher Education Act. Further NAICU supports both the statutory language that allows students to receive student loan forgiveness when defrauded by an institution, and the recent regulatory concept that allows the federal government to be reimbursed by the offending institution when such relief is granted. That does not mean the current regulatory construct is perfect, but any changes should provide protections for defrauded students and taxpayers while also protecting against frivolous lawsuits.

While the Department's final rule did take several appropriate steps to address some of the major problems identified by NAICU in its Notice of Proposed Rulemaking, one aspect which remains particularly troubling to independent colleges is the reliance on the flawed system of financial responsibility standards as an indicator of institutional financial health.

Wendy Macias

July 10, 2017

Page 2

There are several specific concerns with this aspect of the current borrower defense to repayment regulations. First, the financial responsibility process was included in the 1992 reauthorization of the Higher Education Act as an indicator of whether an institution was at-risk of precipitous closure. Notably, we know of no nonprofit college or university which has closed precipitously since the provision has been enacted.

Second, in promulgating borrower defense regulations in 2016, the Department of Education did not disclose before the negotiated rulemaking session actually began that it intended to modify the existing financial responsibility standards, nor did it include on the negotiated rulemaking panel experts with nonprofit accounting experience to lend in the development of these new policies. This, despite the fact, that NAICU and other associations, institutions and Members of Congress had been raising concerns to the Department about the validity of the measure as indicated in this [2012 NAICU report](#). The 2016 regulations added more consequences to the financial responsibility system without correcting its inherent problems.

The financial responsibility standards have not been updated by the Department of Education since 1997, and have unfairly and inappropriately affected nonprofit institutions, often due to misclassified and miscalculated composite ratios by the Department. There are numerous examples of the Department of Education mistreating assets unique to the nonprofit sector, such as endowments and pension liabilities, often requiring institutions to post an expensive and unnecessary letter of credit.

The need to revisit the current Financial Responsibility Standards is no longer an option. For the first time since the 1990s, the professional standards used in the calculation of the financial responsibility composite scores, as required by the Higher Education Act, have been revised. These forthcoming changes to nonprofit accounting standards issued by the Financial Accounting Standards Board (FASB) will make significant changes to existing reporting methodologies, intensifying the need to reevaluate the Department's administration of the financial responsibility standards. Private nonprofit colleges and universities must be in compliance with the updated standards by FY2018-19, though many colleges are expected to adopt early. The financial responsibility standards must be updated to reflect these changing accounting principles.

Therefore, in addition to the negotiated rulemaking panels to address the gainful employment and borrower defense to repayment regulations, NAICU requests that a separate negotiated rulemaking panel be convened to focus on financial responsibility standards, as applied to private nonprofit colleges and universities. The focus of this panel is to improve upon current practices



Wendy Macias

July 10, 2017

Page 3

and to bring the financial responsibility standards in line with evolving Financial Accounting Standards Board (FASB) practices. The panel should run concurrent to the borrower defense panel, if the financial responsibility standards remain intertwined with the borrower defense regulations.

NAICU has worked to identify many of the current problems with the financial responsibility scores, including the formation of a task force dedicated to searching for solutions to fix the problems. The [NAICU 2012 Report on Financial Responsibility](#) provides detailed background on the issues. While some of the recommendations may need further updates, NAICU hopes to work with the Department to address many of its recommendations on the separate negotiated rulemaking panel.

I sincerely appreciate the opportunity to share my thoughts, and I look forward to working with the Department to address this proposal.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Warren", with a long horizontal flourish extending to the right.

David L. Warren  
President